

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LISA McCONNELL, INC., d.b.a.)	
IMAGE ONE, a California Corporation,)	Civil Action No.
)	1:09-cv-04116-NG-VVP
Plaintiffs)	
)	
v.)	DEFENDANT’S ANSWER
)	
AMBASSADOR MEDIA GROUP, LLC,)	
a Delaware limited liability company,)	
)	
Defendant.)	

Defendant, Ambassador Media Group, LLC (“Ambassador”), by its undersigned counsel, as and for its Answer to the First Amended Complaint (the “Complaint”) of Plaintiff Lisa McConnell, Inc., d/b/a Image One (“Plaintiff” or “Image One”), respectfully state and allege as follows:

NATURE OF THE ACTION

1. Avers that paragraph 1 of the Complaint sets forth legal or other conclusions that do not require a response.

JURISDICTION

1. Avers that paragraph 1 [sic] of the Complaint sets forth legal or other conclusions that do not require a response.

VENUE

2. Avers that paragraph 2 of the Complaint sets forth legal or other conclusions that do not require a response.

THE PARTIES

3. Denies knowledge or information sufficient to form a belief as to

the truth of allegations in paragraph 3 of the Complaint and therefore the allegations are denied.

4. Admits the allegations in paragraph 4 of the Complaint.

DEMAND FOR JURY TRIAL

5. Avers that paragraph 5 of the Complaint sets forth legal or other conclusions that do not require a response.

BACKGROUND FACTS

6. Denies knowledge or information sufficient to form a belief as to the truth of allegations in paragraph 6 of the Complaint and therefore the allegations are denied.

7. Denies knowledge or information sufficient to form a belief as to the truth of allegations in paragraph 7 of the Complaint and therefore the allegations are denied.

8. Denies knowledge or information sufficient to form a belief as to the truth of allegations in paragraph 8 of the Complaint and therefore the allegations are denied.

9. Denies knowledge or information sufficient to form a belief as to the truth of allegations in paragraph 9 of the Complaint and therefore the allegations are denied.

10. Denies knowledge or information sufficient to form a belief as to the truth of allegations in paragraph 10 of the Complaint and therefore the allegations are denied.

11. Denies knowledge or information sufficient to form a belief as to the

truth of the allegations in paragraph 11 of the Complaint and therefore these allegations are denied.

12. Avers that paragraph 12 of the Complaint sets forth legal or other conclusions that do not require a response, and denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 and therefore these allegations are denied.

13. Admits that some of its clients acquired advertisements from Image One, which these clients then submitted to Defendant for display and distribution. Denies knowledge or information sufficient to form a belief as to the truth of remaining allegations in the first and second sentences of paragraph 13 of the Complaint and therefore these allegations are denied. Avers that the last sentence of this paragraph sets forth legal or other conclusions that do not require a response.

14. Denies knowledge or information sufficient to form a belief as to the truth of allegations in the first and second sentences of paragraph 14 of the Complaint and therefore these allegations are denied and denies the remaining allegations in paragraph 14 of the Complaint.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15 of the Complaint and therefore these allegations are denied. The legal or other conclusions set forth in this same paragraph do not require a response, but are nonetheless denied.

16. Denies the allegations in paragraph 16 of the Complaint.

17. Denies the allegations in paragraph 17 of the Complaint.

18. Denies the allegations in paragraph 18 of the Complaint and avers

that the same paragraph sets forth legal or other conclusions that do not require a response.

19. Denies the allegations in paragraph 19 of the Complaint.

20. Denies the allegations in paragraph 20 of the Complaint.

21. Denies the allegations in paragraph 21 of the Complaint.

SPECIFIC ACTS OF INFRINGEMENT

22. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 22 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 22 of the Complaint.

23. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 23 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 23 of the Complaint.

24. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 24 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 24 of the Complaint.

25. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 25 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 25 of the Complaint.

26. Denies knowledge or information sufficient to form a belief with

respect to allegations concerning the copyright registration status of the work referred to in paragraph 26 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 26 of the Complaint.

27. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 27 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 27 of the Complaint.

28. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 28 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 28 of the Complaint.

29. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 29 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 29 of the Complaint.

30. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 30 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 30 of the Complaint.

31. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 31 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 31 of the Complaint.

32. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 32 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 32 of the Complaint.

33. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 33 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 33 of the Complaint.

34. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 34 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 34 of the Complaint.

35. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 35 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 35 of the Complaint.

36. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 36 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 36 of the Complaint.

37. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 37 of the Complaint and therefore these allegations are denied and denies

the remainder of the allegations in paragraph 37 of the Complaint.

38. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 38 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 38 of the Complaint.

39. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 39 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 39 of the Complaint.

40. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 40 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 40 of the Complaint.

41. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 41 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 41 of the Complaint.

42. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 42 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 42 of the Complaint.

43. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to

in paragraph 43 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 43 of the Complaint.

44. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 44 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 44 of the Complaint.

45. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 45 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 45 of the Complaint.

46. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 46 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 46 of the Complaint.

47. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 47 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 47 of the Complaint.

48. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 48 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 48 of the Complaint.

49. Denies knowledge or information sufficient to form a belief with

respect to allegations concerning the copyright registration status of the work referred to in paragraph 49 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 49 of the Complaint.

50. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 50 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 50 of the Complaint.

51. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 51 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 51 of the Complaint.

52. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 52 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 52 of the Complaint.

53. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 53 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 53 of the Complaint.

54. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 54 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 54 of the Complaint.

55. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 55 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 55 of the Complaint.

56. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 56 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 56 of the Complaint.

57. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 57 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 57 of the Complaint.

58. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 58 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 58 of the Complaint.

59. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 59 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 59 of the Complaint.

60. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 60 of the Complaint and therefore these allegations are denied and denies

the remainder of the allegations in paragraph 60 of the Complaint.

61. Denies knowledge or information sufficient to form a belief with respect to allegations concerning the copyright registration status of the work referred to in paragraph 61 of the Complaint and therefore these allegations are denied and denies the remainder of the allegations in paragraph 61 of the Complaint.

62. Denies the allegations in paragraph 62 of the Complaint.

63. Denies the allegations in paragraph 63 of the Complaint.

64. Denies the allegations in paragraph 64 of the Complaint.

65. Denies the allegations in paragraph 65 of the Complaint.

COUNT I

(Copyright Infringement)

66. Repeats the responses set forth above to the allegations in paragraphs 1 through 65, as if fully set forth herein.

67. Denies knowledge or information sufficient to form a belief as to the truth of allegations in paragraph 67 of the Complaint and therefore these allegations are denied.

68. Denies knowledge or information sufficient to form a belief as to the truth of allegations in paragraph 68 of the Complaint and therefore these allegations are denied. Avers that the same paragraph also sets forth legal or other conclusions that do not require a response.

69. Denies the allegations in paragraph 69 of the Complaint.

70. Denies the allegations in paragraph 70 of the Complaint.

71. Denies knowledge or information sufficient to form a belief as to the truth of allegations in paragraph 71 of the Complaint and therefore these allegations are

denied. Avers that the same paragraph also sets forth legal or other conclusions that do not require a response.

72. Denies the allegations in paragraph 72 of the Complaint.

73. Denies the allegations in paragraph 73 of the Complaint.

74. Denies the allegations in paragraph 74 of the Complaint and avers that the first and third sentences of the same paragraph set forth legal or other conclusions that do not require a response.

75. Denies the allegations in paragraph 75 of the Complaint and avers that the same paragraph sets forth legal or other conclusions that do not require a response.

76. Denies the allegations in paragraph 76 of the Complaint.

COUNT II

(Vicarious Copyright Infringement)

77. Repeats the responses set forth above to the allegations in paragraphs 1 through 76, as if fully set forth herein.

78. Denies the allegations in paragraph 78 of the Complaint.

79. Denies the allegations in paragraph 79 of the Complaint.

80. Denies the allegations in paragraph 80 of the Complaint.

81. Denies the allegations in paragraph 81 of the Complaint.

82. Denies the allegations in paragraph 82 of the Complaint.

83. Denies the allegations in paragraph 83 of the Complaint.

84. Denies the allegations in paragraph 84 of the Complaint and avers that the first sentence also sets forth legal or other conclusions that do not require a response.

85. Denies the allegations in paragraph 85 of the Complaint and avers that the same paragraph sets forth legal or other conclusions that do not require a response.

86. Denies the allegations in paragraph 86 of the Complaint.

COUNT III

(False Designation of Origin Under Section 43(a) of the Lanham Act [15 U.S.C. §1125(a)])

87. Repeats the responses set forth above to the allegations in paragraphs 1 through 86, as if fully set forth herein.

88. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph 88 of the Complaint and therefore these allegations are denied.

89. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph 89 of the Complaint and therefore these allegations are denied.

90. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph 90 of the Complaint and therefore these allegations are denied. Avers that the last sentence of the same paragraph also sets forth legal or other conclusions that do not require a response.

91. Denies the allegations in paragraph 91 of the Complaint.

92. Denies the allegations in paragraph 92 of the Complaint.

93. Denies the allegations in paragraph 93 of the Complaint and avers that the same paragraph sets forth legal or other conclusions that do not require a response.

- 94. Denies the allegations in paragraph 94 of the Complaint.
- 95. Denies the allegations in paragraph 95 of the Complaint.
- 96. Denies the allegations in paragraph 96 of the Complaint.
- 97. Denies the allegations in paragraph 97 of the Complaint.

AFFIRMATIVE DEFENSES

In addition to the specific responses set forth above, Defendant asserts the following affirmative defenses upon information and belief. Following investigation and discovery of the details of Image One's contentions and the facts affecting each defense, Defendant will seek leave to modify or supplement the enumerated defenses as appropriate.

FIRST AFFIRMATIVE DEFENSE **(Failure to State a Claim Upon Which Relief May Be Granted)**

- 98. The Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE **(Failure to Join Indispensable Parties)**

- 99. Plaintiff has failed to join indispensable parties.

THIRD AFFIRMATIVE DEFENSE **(Failure of a Condition Precedent to Suit)**

- 100. Plaintiff's claims are barred in whole or in part because certain of Plaintiff's alleged copyrights in its advertising templates, artworks, and advertisements were not registered with the U.S. Copyright Office prior to the filing of this Complaint. Accordingly, Plaintiff's claims of infringement of such templates are barred under 17 U.S.C. § 411(a).

FOURTH AFFIRMATIVE DEFENSE

(Failure of Condition Precedent to Suit)

101. Plaintiff's claims are barred in whole or in part because certain of Plaintiff's advertising templates, artworks, and advertisements were not registered correctly with the U.S. Copyright Office in accordance with 17 U.S.C. § 408. Accordingly, Plaintiff's claims of infringement of such works are barred under 17 U.S.C. § 411(a).

FIFTH AFFIRMATIVE DEFENSE
(Lack of Originality and/or Copyrightable Subject Matter)

102. Plaintiff's claims are barred in whole or in part because Plaintiff's contributions, if any, to what it purports are its advertising templates, artwork, and advertisements are not protectible under the Copyright Act. Specifically, Plaintiff's templates, artworks, and advertisements are comprised of public domain material, material owned and licensed by third parties, and/or otherwise lack the requisite level of originality to be deemed protectible.

SIXTH AFFIRMATIVE DEFENSE
(Fraud on the Copyright Office)

103. Plaintiff's claims are barred in whole or in part by virtue of its attempt to deceive or commit fraud on the U.S. Copyright Office by omitting and/or misidentifying the amount of preexisting works and/or public domain material contained in Plaintiff's templates, artworks, and advertisements in its copyright registration applications, as required by 17 U.S.C. § 409. Accordingly, such copyrights are invalid and unenforceable.

SEVENTH AFFIRMATIVE DEFENSE
(Copyright Misuse)

104. Plaintiff's claims are barred in whole or in part by the doctrine of

copyright misuse.

EIGHTH AFFIRMATIVE DEFENSE
(License)

105. Upon information and belief, Plaintiff directly or indirectly authorized or licensed Defendant's publication of certain of Plaintiff's advertising templates, artworks, and advertisements in Defendant's directories. In addition, third parties authorized or licensed Defendant's publication, in Defendant's directories, of such third parties' works contained in Plaintiff's advertising templates, artworks, and advertisements.

106. Alleged changes that Defendant made to these licensed templates, artworks, and advertisements do not constitute copyright infringement, either because they are *de minimis*, because they are not the type of changes that the copyright laws are designed to address, and/or because such changes are made to material in which Plaintiff owns no copyright.

NINTH AFFIRMATIVE DEFENSE
(No Substantial Similarity)

107. Certain of the allegedly infringing advertisements in Defendants' directories are not substantially similar to Plaintiff's registered advertising templates, artworks, and advertisements.

TENTH AFFIRMATIVE DEFENSE
(de minimis Copying)

108. As to certain of the allegedly infringing advertisements, Defendant's activities constitute, at most, *de minimis* copying and therefore do not constitute infringement.

ELEVENTH AFFIRMATIVE DEFENSE

(No Copying/Independent Creation)

109. Defendant independently created or had created for Defendant some of the advertisements at issue in this suit from Defendant's own original works, public domain material, and/or licensed third party works.

TWELFTH AFFIRMATIVE DEFENSE
(No Infringement of Ideas)

110. Defendant copied, at most, unprotectible ideas reflected in certain of Plaintiff's advertising templates, artworks, and advertisements, rather than any copyrightable expression in such advertising templates, artworks, and advertisements.

THIRTEENTH AFFIRMATIVE DEFENSE
(Fair Use)

111. Plaintiff's claims in whole or in part are barred by the doctrine of fair use.

FOURTEENTH AFFIRMATIVE DEFENSE
(Failure of Condition Precedent to
Statutory Copyright Damages and Attorney's Fees)

112. Plaintiff's claims for statutory damages and attorney's fees under the Copyright Act are barred in whole or in part by virtue of Plaintiff's failure to comply with 17 U.S.C. § 412.

FIFTEENTH AFFIRMATIVE DEFENSE
(Functionality)

113. Plaintiff's third cause of action is barred because Plaintiff's alleged marks are functional.

SIXTEENTH AFFIRMATIVE DEFENSE
(Non-Distinctiveness)

114. Plaintiff's third cause of action is barred because Plaintiff's alleged marks are not inherently distinctive, and have not acquired distinctiveness.

SEVENTEENTH AFFIRMATIVE DEFENSE
(Non-Trademarks)

115. Plaintiff's third cause of action is barred because Plaintiff's alleged marks do not function as marks.

EIGHTEENTH AFFIRMATIVE DEFENSE
(No Use in Commerce)

116. Plaintiff's third cause of action is barred in part because Defendant has not used one or more of Plaintiff's alleged marks in commerce.

NINETEENTH AFFIRMATIVE DEFENSE
(No Likelihood of Confusion)

117. Plaintiff's third cause of action is barred because Defendant's activities do not create a likelihood of confusion.

TWENTIETH AFFIRMATIVE DEFENSE
(Lack of Willfulness)

118. Defendant has not acted willfully or with knowledge of the infringement of Plaintiff's rights.

TWENTY-FIRST AFFIRMATIVE DEFENSE
(Unclean Hands)

119. Plaintiff's claims and requested relief are barred in whole or in part by reason of its unclean hands.

TWENTY-SECOND AFFIRMATIVE DEFENSE
(Waiver)

120. Plaintiff's claims and requested relief are barred in whole or in part by the doctrine of waiver.

TWENTY-THIRD AFFIRMATIVE DEFENSE
(Consent and/or Release)

121. Plaintiff's claims and requested relief are barred in whole or in part

by the doctrine of consent and/or release.

TWENTY-FOURTH AFFIRMATIVE DEFENSE
(Laches and/or Estoppel)

122. Plaintiff's claims and requested relief are barred in whole or in part by the doctrines of laches and/or estoppel.

TWENTY-FIFTH AFFIRMATIVE DEFENSE
(Mitigation of Damages)

123. Plaintiff's remedies are barred in whole or in part by its failure to make reasonable efforts to mitigate damages.

TWENTY-SIXTH AFFIRMATIVE DEFENSE
(Statute of Limitations)

124. Plaintiff's claims are barred in whole or in part because the Complaint was not filed within the limitations period prescribed in 17 U.S.C §507(b) and/or any limitations period applicable to the Lanham Act claim.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays:

- (a) For judgment dismissing the Complaint herein and entering judgment for Defendant thereon;
- (b) For judgment awarding Defendant its attorney's fees and costs; and
- (c) For judgment awarding Defendant such other and further relief as the Court deems just.

Dated: October 25, 2010

Respectfully submitted,

SATTERLEE STEPHENS BURKE &
BURKE LLP

By: _____/s/ Mark A. Fowler

Mark A. Fowler

Justin E. Klein

M.J. Williams

230 Park Avenue

New York, NY 10169

(212) 818-9200

(212) 818-9606 (facsimile)

*Counsel for Defendant Ambassador Media
Group LLC*